BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOHN MCENTIRE	)	
Claimant	)	
V.	)	
	)	Docket No. 1,025,934
DURHAM D&M	)	
Respondent	)	
AND	)	
	)	
FIDELITY & GUARANTY INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the June 9, 2015, Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on October 6, 2015.

APPEARANCES

John J. Bryan, of Topeka, Kansas, appeared for the claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record (including any medical reports from independent medical examinations ordered by the ALJ in this matter) and adopted the stipulations listed in the Award. Additionally, pursuant to the Board's request, the parties provided a detailed printout of the temporary total disability compensation (TTD) paid and the weeks of payment. The stipulation affirms payment of $38,075.83 in TTD benefits in varying amounts from January 13, 2005, through November 18, 2010, a period of 305 weeks. The issue of additional TTD or any overpayment was not brought before the Board. At $125.32 per week, the paid amount calculates to 303.83 weeks of TTD. This number will be incorporated into the Order issued by the Board.

ISSUES

The ALJ found the following:

1. Claimant suffered personal injury by accident that arose out of and occurred in the course of his employment with respondent.

2. Claimant sustained a 31 percent body as a whole functional impairment, based upon the opinion of Dr. Pratt.

3. Claimant is not realistically employable and is therefore permanently and totally disabled.

4. Claimant was correctly paid 313.76 weeks of TTD compensation. The rate was adjusted to $125.32 per week based on the stipulated average weekly wage of $187.97; all medical treatment provided by Dr. Amundson was related to the accidental injury in question and there was no evidence presented of respondent's failure to pay TTD compensation for any period during which claimant was eligible.

5. Claimant's mileage expenses for prescription refills were ordered paid, per exhibit two of the Regular Hearing. The request for mileage reimbursement for the Benjamin trip was denied. Reimbursement for co-pays for prescriptions from Dr. Petersen were ordered paid as unauthorized medical, if available.

6. Claimant is entitled to future medical and Dr. Petersen was authorized to provide palliative care. All objections were overruled unless specifically noted.

Respondent appeals, arguing claimant is not permanently and totally disabled, because he was found by Steve Benjamin, based on the restrictions of Drs. Amundson and Pratt, capable of working as a substitute teacher and could work as a driver, security guard, cashier or sales clerk. Respondent also contends that claimant's self-perceived limitations, which are not necessarily due to the injury, should not be made part of the permanent total disability equation. Respondent argues that any award should be limited to a permanent partial disability or work disability of 59.32 percent.

Claimant contends the Award should be affirmed, arguing it is unlikely he would be able to find employment due to his age; restrictions; need for a wheelchair; lack of transferrable job skills; use of prescription narcotics and overall general physical shape. Therefore, he is essentially and realistically unemployable.

Issues on Appeal:

1. What is the nature and extent of claimant's disability? More particularly, is claimant permanently and totally disabled, being "essentially and realistically

unemployable" considering claimant's age of 75, physical condition, use of a wheelchair and prescription narcotics?

2. What, if any, additional medical expense is due to claimant?

3. Is claimant entitled to future and unauthorized medical care?

At oral argument to the Board, respondent acknowledged claimant suffered personal injury by accident which arose out of and in the course of his employment with respondent on the date alleged.

FINDINGS OF FACT

Claimant began working for respondent in August 2004 as a bus driver. On January 12, 2005, claimant slipped and fell on the ice as he was walking in the parking lot on his way to his bus. Claimant landed on his upper back, shoulders and head. He lost consciousness and was taken by his supervisor to the emergency room at St. Francis Hospital. Claimant testified he had a lot of pain in his shoulders, neck, head and back. Claimant was given pain medication and released that night. Claimant met with Dr. Welch in February for followup and an EMG. He later followed up with Dr. Arjunan who ordered a CT scan of claimant's back to look for a bleed in the spine. Claimant discussed his neck pain with Dr. Arjunan.

Claimant met with Michael Smith, M.D.[1] Dr. Smith determined claimant fractured his back at L3 when he slipped and fell. Dr. Smith performed a lumbar fusion on claimant's low back on May 2, 2005, and treated claimant until September 20, 2005, when claimant was released. Claimant acknowledged the treatment with Dr. Smith improved his back condition.

After treatment with Dr. Smith was completed, claimant met with John B. Moore, M.D., for surgery on his hands consisting of bilateral carpal tunnel syndrome surgery and left cubital tunnel surgery. Claimant testified that Dr. Moore told him the carpal tunnel syndrome was not caused by the fall. The surgery made claimant's condition worse, as after, he was unable to close his hands.

At respondent's referral, claimant met with Terrence Pratt, M.D., on May 22, 2007, for an examination. Claimant reported cervical and upper back discomfort with symptoms radiating into the upper extremities and low back pain. Claimant's symptoms were exacerbated with activity. Claimant reported using forearm crutches for the last six months for ambulation.

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[1] Claimant wanted to see Dr. Smith because he had performed surgery on claimant's back about a year prior to the accident. (P.H. Trans. (April 29, 2008) at 35-36).

Dr. Pratt examined claimant and reviewed his records and opined claimant had cervicothoracic syndrome with multilevel degenerative disc disease; thoracolumbar syndrome with apparent soft tissue involvement and mass etiology unclear; lumbosacral dysfunctional with history of remote L4-5 fusion and degenerative disease status post recent instability L3-4 with resultant fusion; history of median nerve entrapment wrist, ulnar nerve entrapment wrist, ulnar nerve entrapment left elbow status post multiple procedures and electrodiagnostic study reporting a peripheral polyneuropathy.

Dr. Pratt assigned claimant a 25 percent permanent partial whole person impairment (15 percent for cervicothoracic spine; 7 percent aggravation of cervical spine; 5 percent for the thoracic spine). Dr. Pratt limited claimant to the light to medium physical demand level. Dr. Pratt did not feel claimant's balance limitations and multiple nerve entrapments and reported history of a peripheral polyneuropathy were directly related to the reported work accident.

Claimant denied any serious neck problems prior to the January 12, 2005, slip and fall. He admitted to minor aches and pains in his neck, periodic low back pain and pain in his right knee, mostly from his 22 years in the Navy working on the steel dock. He denied any injuries during his time in the Navy, but received a medical discharge from the Navy for his knee pain.[2]

Claimant testified he began using crutches after his last operation because his legs started hurting and he wanted to take the weight off his right leg. He also testified that his right leg was tripping him up and causing him to fall, so he felt crutches were a good idea.

Claimant fell in September 2010, when his right leg gave out. This fall caused claimant's pain level to increase from 3 to 10 on a 0-10 scale. Claimant was given pain medication and light duty restrictions. Respondent offered claimant an office job, but he declined the offer.

Claimant testified he constantly uses a wheelchair outside of the house. In the house, he has it arranged so that there is always something to hold on to because there is not enough room in his house for the wheelchair to move around. Claimant testified he needs the wheelchair or something to hold onto because he has dizzy spells from the concussion suffered during the accident. Claimant testified another effect of the concussion is he will fall. He does not faint or pass out, he just has total confusion for a second and goes down. He indicated it feels like he is tripping. Claimant denies any injuries or problems to his knees prior to the work injury.

[2] P.H. Trans. (Apr. 29, 2008) at 33.

Claimant described a typical day:

> Okay. Typically, if I started the day in the morning, I will go down -- We have chickens and geese and I just open the latches on the cages and let them out in the yard, go back in the house, and from there it's just see what happens next thing. I will sit. I might go to the basement and piddle on something, go to the garage and piddle on something. I can't do very much as far as intricate work because I can't hold onto things with my hands, but something to just take my mind off the pain. I just piddle on stuff.[3]

Claimant testified his pain is from the shoulder blades down his back, through his hips, down his legs - mainly the left leg, down the thigh, the knee and, at times, down to his foot. He has weakness in his right leg which causes him to fall, but his left leg is the major source of his pain. It is also his strongest leg.

Records indicate claimant had an incident on June 2, 2007, where he received an electric shock and was thrown several feet in the air, and had neck problems afterward. Claimant did not recall this incident.[4] He also did not recall an incident in 2010, where he shot himself with a nail gun.[5]

Claimant first met with board certified orthopedic surgeon, Glenn M. Amundson, M.D., on February 20, 2008, for a consultation. This was a referral from Horace Petersen, D.O., of the Neosho Bone and Joint Clinic. Claimant informed Dr. Amundson he had multiple injuries to his neck and head as a child. Claimant presented with neck pain and bilateral arm and hand numbness and pain. Dr. Amundson noted claimant suffered several injuries before and after his January 2005 work injury. Claimant reported 30 percent of the pain was in his neck and 70 percent in his arms and hands. Dr. Amundson examined claimant and diagnosed cervical spine spondylosis, neck pain, status post bilateral carpal tunnel release. He scheduled claimant for an MRI of the cervical spine, suspecting they would be discussing surgical intervention.

On March 31, 2008, Dr. Amundson performed an anterior cervical discectomy and fusion from C4 to C7. X-rays on April 11, 2008, showed the prosthesis at C4-7 to be well placed with an anterior plate through the vertebral bodies from C4-7. Claimant reported some discomfort between his shoulder blades, which the doctor indicated was common. Claimant was provided a bone stimulator and remained on pain medication.

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[3] R.H. Trans. at 33-34.

[4] *Id.* at 43.

[5] *Id.* at 44.

Claimant was seen by Dr. Amundson on May 17, 2008. Claimant was pleased with the surgical result, and declined physical therapy. Claimant reported his pain level at 2 to 3 on a 10 scale.

Claimant was seen again on July 9, 2008. He continued to progress post surgery. He demonstrated significant subacromial impingement pain to palpation and to shoulder abduction testing for impingement, which was thought to be subacromial bursitis with the left worse than the right. This was previously diagnosed by Dr. Petersen.

On September 10, 2008, claimant was found to be at MMI for the neck. Claimant requested an evaluation of the lumbar spine for which Dr. Amundson had not been authorized. Dr. Amundson recommended an MRI of the lumbar spine.

By September 26, 2008, Dr. Amundson was authorized by the ALJ to examine claimant's lumbar spine. The doctor ordered the MRI, which showed a supra adjacent level breakdown or injury at L2-3 on the right and a bulging disk at the sub adjacent level L5-S1. Dr. Amundson believed this was aggravated by the work injury and recommended epidural injections. Claimant was taken off work for 6 weeks and underwent three injections.

On November 12, 2008, claimant reported minimal relief from the injections to the lumbar spine. He was also having problems with his left shoulder. Claimant believed his shoulder problems were related to the work accident. It was suggested claimant not work for 6 weeks. Dr. Amundson elected to give claimant more time with the low back treatment, as claimant was scheduled for left shoulder surgery.

Dr. Amundson met with claimant again on January 14, 2009. Claimant underwent left shoulder surgery on November 22, 2008, with Dr. Peterson. But Dr. Amundson's focus was on claimant's low back. Dr. Amundson felt claimant should continue with conservative treatment with the physicians authorized through workers compensation. He felt claimant's shoulder needed time to heal before additional treatment of the low back. It was suggested claimant not work for another 6 weeks. Claimant continued to express satisfaction with the results of the cervical surgery. Claimant reported being significantly improved from the surgery.

Claimant was allowed to return to work with permanent restrictions on February 18, 2009, of no lifting over 35 pounds occasionally, and working at the light medium level with respect to his neck only. Claimant continued to have issues with his lumbar spine, but Dr. Amundson was not authorized to treat that area. Claimant was again found to be at MMI for the cervical spine.

By March 27, 2009, Dr. Amundson was authorized to examine the lumbar spine and ordered a myelogram/CT. Claimant had significant pain in his low back. It was suggested

claimant not work for 8 weeks. X-rays taken on March 27, 2009, displayed an attempted fusion L3-5, which was read as intact.

On April 24, 2009, claimant was referred to a neurosurgeon for continued issues with his lumbar spine. The plan was to redo claimant's lumbar spine surgery. It was suggested claimant not work for 4 weeks. Dr. Amundson diagnosed significant spinal stenosis at L2-3, supra adjacent to the L3-5 fusion. This was diagnosed as an adjacent level breakdown, with mild residual stenosis at L3-4.

On October 14, 2009, claimant was scheduled for revision surgery to the lumbar spine. Prior to the surgery, Dr. Amundson recommended a neurosurgical evaluation of claimant's back at T7-8.

Claimant had surgery on his lumbar spine on March 11, 2010. Claimant had a good result from the surgery and was able to, over time, increase his physical activity. Claimant reported good progress on March 26, 2010.

Claimant was weaned off his oxycodone beginning June 9, 2010. It was suggested he not work for another 6 weeks and then he could to return to work. X-rays on June 9, 2010, indicated the surgical site was well healed with no loose instrumentation. Claimant was to remain off work for 6 weeks, with a return to a light physical demand level of activity thereafter. Claimant was limited to occasional lift/carry of 20 pounds.

On September 8, 2010, claimant was returned to light duty even though he was retired. Claimant reported at this visit that he suffered a fall three weeks prior and wrenched his back. His pain level was a 10. He had some tenderness. His surgical revision was intact. He was forwarded for approval of a lumbosacral corset.

On October 27, 2010, claimant had significant right leg pain and was using crutches. He was diagnosed with cellulitis on his right medial calf. This was not related to the surgery. The lumbar spine examination was fine.

On November 10, 2010, claimant's cellulitic involvement in the right leg was completely resolved. Claimant was thought to be at MMI for the low back and was sent for and an FCE. The FCE was showed claimant could function in a medium physical demand level. However, the FCE was found to be invalid based on inconsistencies in the evaluation that represented a manipulated effort by claimant.[6] It was felt by the evaluator that claimant could have done more at the evaluation. Dr. Amundson indicated he did not

[6] Amundson Depo. at 27.

feel claimant was a malingerer or that he was exaggerating his symptoms, so he was surprised the FCE was considered invalid.[7]

On March 28, 2011, Dr. Amundson assigned claimant a 24 percent whole body impairment (15 percent for cervical spine and 10 percent for the lumbar spine). On April 11, 2011, claimant was discharged from care and told he could function at the light physical demand level. Claimant was found to be at MMI.

On August 17, 2011, Claimant returned with left hand, right leg and neck pain. Tests were ordered. This was the last time Dr. Amundson met with claimant.

Dr. Amundson reviewed the task list prepared by vocational expert Steve Benjamin and found that out of 26 tasks, claimant could no longer perform 4 for a 15 percent task loss.

Dr. Amundson acknowledged claimant would need medical management the rest of his life for symptoms in his spine and associated musculature, tendons and ligaments. He testified claimant has done well, but "has a multiply-operated back, he has an operated neck at multiple levels, his hands have been operated on multiple times, . . . he's elderly. . . "[8]

When asked if he thought claimant could return to substantial, gainful employment he testified:

> I mean, I don't know. I mean, I hope not. I mean, honestly, he's 75, and, I mean, I hope he could give himself a break, but do I think he can function, if he could find something at a light to a light medium physical demand level, could he do it, as long as there's frequent change of position and some standing, but, I mean, other than being a greeter at Wal-Mart, but I don't know why he would want to do that at age 75.[9]

Ultimately, he opined there is no reason claimant could not work within the limitations imposed, if claimant wanted to.

At the request of his attorney, claimant met with Daniel D. Zimmerman, M.D., on August 15, 2014, for an examination. Claimant's chief complaint was pain and discomfort affecting the axial skeleton and upper extremities. Dr. Zimmerman examined claimant and opined he had severe limitations in the cervical spine, lumbosacral spine, and right and left

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[7] *Id.* at 41.

[8] *Id.* at 42-43.

[9] *Id.* at 45.

upper extremities. Dr. Zimmerman felt the prevailing factor for claimant's symptoms was the January 12, 2005, accident. He assigned claimant an overall 60 percent whole person functional impairment. Dr. Zimmerman apportioned 13 percent to claimant's lumbar spine condition that predated the January 12, 2005, accident and 7 percent as a result of the January 12, 2005, accident.

Dr. Zimmerman opined that, although claimant was at MMI, it was more probably true than not that additional medical treatment provided or prescribed by a licensed physician will be necessary in the future. He found claimant to be permanently and totally disabled due to severe limitations to claimant's cervical and lumbosacral spines. He noted claimant uses a motorized wheelchair to get around for long distances outside of the home due to instability issues. He did not feel claimant should be driving and would not approve him for a driver's license.

On January 6, 2015, Dr. Zimmerman wrote claimant was capable of lifting 20 pounds occasionally and 10 pounds frequently. Claimant should avoid frequent flexion, extension, twisting, torquing, pushing, pulling, hammering, handling, holding, and reaching activities using the right and left upper extremities. Dr. Zimmerman noted these activities would have to be performed at a desk or at a bench due to claimant's instability.

Upon review of the task list compiled by Dick Santner, Dr. Zimmerman opined claimant has a 100 percent task loss.

Claimant met with Dr. Pratt for another examination on April 20, 2015. Claimant reported lumbosacral discomfort with cervical and bilateral upper extremity symptoms. Claimant's cervical complaints were nearly continuous with pain on the left side. He had no radicular symptoms in the cervical region, but had occasional aching in his shoulders. He had continuous pain in his hands. Claimant's low back symptoms were almost continuous, with severe shooting across the areas with associated burning. Claimant had symptoms radiating into the buttocks and to the anterior knees. Claimant's lower extremity symptoms exceeded the low back involvement and the left lower extremity exceeded the right. Claimant reported weakness of the right lower extremity and admitted to numbness in his legs since 1971. When claimant is not using a motorized device to get around he uses two canes or forearm crutches.

Dr. Pratt examined claimant, noting a history of cervical spondylosis with radiculopathy, spinal stenosis and herniated disk, status post decompression and fusion C4-7; low back pain with remote L4-5 fusion and degenerative disk disease, L3-4 instability resulting in fusion, more recent L2-3 spinal stenosis with resultant removal of instrumentation, exploration of fusion, bilateral laminectomy, partial facetectomy, and foraminotomy L2, redo L3, L4 and L5, neural foraminal decompression L2 to L5 with re-instrumentation L2-4 with new instrumentation L2 and posterolateral fusion at L2 to L4;

thoracic spondylosis with apparent arachnoid cyst[10] with spinal stenosis and spondylosis; bilateral shoulder syndrome, status post operative intervention bilaterally; history apparent peripheral polyneuropathy, status post remote bilateral carpal tunnel release procedures with subsequent carpal tunnel release procedures bilaterally and ulnar release at the elbow level and at the wrist; a history of lymphoma, diabetes mellitus, degenerative joint disease at the hip level and memory loss of undetermined etiology. Dr. Pratt determined the cervicothoracic and lumbosacral involvement were related to the January 12, 2005, accident and everything else was not.

Dr. Pratt found claimant to have a 31 percent whole person impairment (17 percent cervicothoracic; 17 percent lumbosacral). He considered 8 percent of the lumbosacral impairment to be preexisting. Claimant was instructed to avoid odd positioning of the cervical region, no frequent bending or twisting, maximum lifting of 20 pounds, maximum pulling and pushing of 25 pounds, no prolonged walking or standing. Dr. Pratt felt claimant could perform activities within a light sedentary level. Dr. Pratt did not feel claimant was malingering.

Dr. Pratt reviewed the task list prepared by Steve Benjamin and opined claimant could no longer perform 6 out of 26 tasks for a 23 percent task loss.

Vocational expert Dick Santner evaluated claimant at the request of claimant's attorney. Mr. Santner determined claimant was realistically unemployable in his current condition. Claimant was not working and had a 100 percent wage loss.

At respondent's request, claimant was evaluated by vocational expert Steve Benjamin. Claimant was not working at the time of the evaluation, but Mr. Benjamin determined claimant was capable of earning a comparable wage in the open labor market, based upon the average weekly wage being earned by claimant on the date of accident of $187.97. Mr. Benjamin's opinion was based upon the restrictions placed upon claimant by Dr. Amundson and Dr. Pratt. Mr. Benjamin acknowledged, with the restrictions placed upon claimant by Dr. Zimmerman, claimant would not be able to return to work in the open labor market.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[11]

[10] This is not related to an injury.

[11] K.S.A. 2004 Supp. 44-501 and K.S.A. 2004 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[12]

K.S.A. 2000 Furse 44-510c(a)(b)(1)(2) states:

> (a)(1) Where permanent total disability results from the injury, weekly payments shall be made during the period of permanent total disability in a sum equal to 66⅔% of the average gross weekly wage of the injured employee, computed as provided in K.S.A. 44-511 and amendments thereto, but in no case less than $25 per week nor more than the dollar amount nearest to 75% of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto, per week. The payment of compensation for permanent total disability shall continue for the duration of such disability, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.
> (2) Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.
> (b) (1) Where temporary total disability results from the injury, no compensation shall be paid during the first week of disability, except that provided in K.S.A. 44-510h and 44-510i and amendments thereto, unless the temporary total disability exists for three consecutive weeks, in which case compensation shall be paid for the first week of such disability. Thereafter weekly payments shall be made during such temporary total disability, in a sum equal to 66⅔% of the average gross weekly wage of the injured employee, computed as provided in K.S.A. 44-511 and amendments thereto, but in no case less than $25 per week nor more than the dollar amount nearest to 75% of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto, per week.

The ALJ determined claimant was permanently and totally disabled as the result of the accident on January 12, 2005. This determination was supported by the opinions of Dr. Zimmerman and vocational expert Dick Santner. However, Dr. Pratt, Dr. Amundson and vocational expert Steve Benjamin all found claimant capable of returning to the open labor market in some capacity. Mr. Benjamin found claimant capable of earning a comparable wage, based upon the restrictions issued by Dr. Pratt and Dr. Amundson. The Board finds the opinions of Dr. Pratt and Dr. Amundson and that of Mr. Benjamin to be more persuasive than Dr. Zimmerman and Mr. Santner. Claimant is not permanently and

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[12] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984). K.S.A. 2004 Supp. 44-501(a) and K.S.A. 2004 Supp. 44-508(g).

totally disabled as the result of the accident on January 12, 2005. The Award is reversed on this issue.

Dr. Pratt found claimant's upper extremity problems were not related to the accident. Dr. Zimmerman found all of claimant's symptoms to stem from the fall on January 12, 2005. The Board has found the medical opinions of Dr. Pratt to be more persuasive than that of Dr. Zimmerman. Claimant has failed to prove his upper extremity symptoms stem from the work related accident.

It is clear that claimant suffered significant injuries from the accident. Claimant was paid over 300 weeks of TTD and the Board finds 303.83 weeks of TTD payments at $125.32 per week, totaling $38,075.83, are properly ordered in this matter. The Award of the ALJ is modified accordingly.

K.S.A. 2000 Furse 44-510e(a) states:

> (a) If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66⅔% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44- 510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in

> excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination. The amount of weekly compensation for permanent partial general disability shall be determined as follows:
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> (1) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average gross weekly wage of the worker prior to such injury by 66⅔% or (B) the maximum provided in K.S.A. 44-510c and amendments thereto;
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> (2) find the number of disability weeks payable by subtracting from 415 weeks the total number of weeks of temporary total disability compensation was paid, excluding the first 15 weeks of temporary total disability compensation that was paid, and multiplying the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and
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> (3) multiply the number of disability weeks determined in paragraph (2) of this subsection (a) by the payment rate determined in paragraph (1) of this subsection (a).
>
> The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

It has been stipulated that claimant has suffered a 100 percent wage loss, as both vocational experts agree claimant is not currently working, having no income after the TTD payments ceased.

Dr. Amundson found claimant suffered a 15 percent task loss as the result of this accident and resulting injuries. Dr. Pratt found claimant suffered a 23 percent task loss. Dr. Zimmerman determined claimant's task loss was 100 percent, finding claimant incapable of returning to any jobs claimant had worked during the 15 years prior to the accident. However, certain tasks excluded by Dr. Zimmerman required only occasional short reaching, fingering and frequent sitting. Those tasks were only prohibited by the restrictions of Dr. Zimmerman, which the Board finds less persuasive than Dr. Pratt and Dr. Amundson. The Board does not find the task loss opinion of Dr. Zimmerman credible in this matter. The task loss opinions of Dr. Pratt and Dr. Amundson, when combined, average to a task loss of 19 percent. The Award is modified accordingly.

In averaging claimant's 100 percent wage loss with a 19 percent task loss, the Board finds claimant has suffered a permanent partial general (work) disability of 59.5 percent.

The ALJ found Dr. Petersen to have provided unauthorized medical treatment, as the record contains no information supporting his appointment as an authorized treater. The Board finds the upper extremity injuries and symptoms suffered by claimant are not related to the accident on January 12, 2005. Therefore, any medical treatment provided by Dr. Petersen is unrelated to claimant's workers compensation accident. Therefore, the medical expenses associated with the treatment provided by Dr. Petersen are denied.

Claimant is entitled to future medical treatment upon application to and approval by the Director. The appointment of Dr. Petersen for the purposes of providing palliative care is affirmed, but only for those injuries found to be compensable herein.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified. TTD is awarded as above calculated. Claimant is found to have suffered a permanent partial general disability of 59.5 percent. Claimant has failed to prove that he is permanently and totally disabled as the result of his January 12, 2005, accident while working for respondent. The medical treatment provided by Dr. Petersen is denied as not related to the above accident. Future medical treatment is granted as above noted.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated June 9, 2015, is modified as above noted.

Claimant is entitled to 303.83 weeks of temporary total disability compensation at the rate of $125.32, totaling $38,075.83 followed by 75.07 weeks of permanent partial disability compensation at the rate of $125.32, totaling $9,407.77, for a total award of $47,483.60, for a 59.5 percent whole person permanent partial general disability, all of which is due and owing and ordered paid in one lump sum, minus amounts already paid. In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this _____ day of November, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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